

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

NO. 76-7106

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 76-7106

WARDELL HUNTER
401 Northampton St.
Buffalo, New York 14208,

Plaintiff-Appellant,

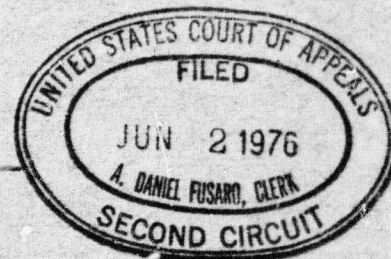
- against -

RAYMOND R. NIEMER
Judge, Family Court
County Hall
Buffalo, New York

and

STATE OF NEW YORK
State Office Building
Buffalo, New York,

Defendants-Appellees.



ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE STATE OF NEW YORK

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TABLE OF CONTENTS

	<u>Page</u>
Statement	1
Question Presented	2
Nature of the Case	2
Decision of the Court Below	3
ARGUMENT: The doctrines of sovereign immunity and judicial immunity bar the plaintiff from maintaining the instant action. The District Court properly dismissed the complaint.	3
Conclusion	4

TABLE OF CASES AND CITATIONS

Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri, 411 U.S. 279 (1973)	3
Hans v. Louisiana, 134 U.S. 1 (1890)	3
Imsler v. Pachtman, _____ U.S. _____, 47 L. Ed. 2d 128, 136-137 (March 2, 1976)	4
Pierson v. Ray, 386 U.S. 547 (1967)	4
Serano v. People of the State of California, 361 F. 2d 474 (9th Cir., 1966), cert. den. 385 U.S. 993)	4

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ON APPEAL FROM THE
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BRIEF FOR APPELLEE STATE OF NEW YORK

Statement

This is an appeal from an order and judgment of the United States District Court for the Western District of New York (CURTIN, J.) which dismissed the plaintiff's complaint against the defendants.

Question Presented

Do the doctrines of sovereign immunity and judicial immunity bar an action against the State and a Family Court judge for action taken by the judge in his official capacity?

Nature of the Case

The plaintiff brought this action alleging violation of his civil rights by Hon. Raymond R. Niemer, Judge of the Erie County Family Court, and the State of New York. The plaintiff's allegations stem from actions by Judge Niemer in his official capacity as a judge of the Erie County Family Court. Plaintiff alleges that some ten years ago he was sentenced by Judge Niemer to a six-month jail term for failure to support his wife and children. Plaintiff further alleges that he is still under an order of the Erie County Family Court to support his wife and children.

It is apparently plaintiff's contention that these actions by Judge Niemer and the State of New York have resulted in depriving plaintiff of his civil rights. Plaintiff alleges jurisdiction under several Federal civil rights statutes. Plaintiff requested the convening of a three-judge court, the granting of declaratory and injunctive relief, and money damages.

The District Court granted the State of New York's motion to dismiss.

Decision of the Court Below

In dismissing plaintiff's complaint, the District Court stated that the eleventh amendment to the United States Constitution prohibits a suit against a state by one of its own citizens without consent. In support of this the Court cited Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri, 411 U.S. 279 (1973). As to the defendant, Judge Raymond R. Niemer, the Court found that the complaint was so obviously without merit that it should also be dismissed against him.

ARGUMENT

THE DOCTRINES OF SOVEREIGN IMMUNITY
AND JUDICIAL IMMUNITY BAR THE PLAINTIFF
FROM MAINTAINING THE INSTANT ACTION.
THE DISTRICT COURT PROPERLY DISMISSED
THE COMPLAINT.

The doctrine of sovereign immunity, as embodied in the eleventh amendment to the United States Constitution, bars the plaintiff from suing his own state without its consent in Federal Court (Hans v. Louisiana, 134 U.S. 1 [1890]; Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri, 411 U.S. 279 [1973])). No consent, either express or implied, was given by the State of New York for the maintenance of the instant suit by the plaintiff.

Moreover, the plaintiff, in his complaint, complains of action taken by Judge Niemer in his official capacity as a judge of the Erie County Family Court. The doctrine of judicial immunity bars the plaintiff from including Judge Niemer as a defendant in this action (Pierson v. Ray, 386 U.S. 547 [1967]; Imsler v. Pachtman, _____ U.S. _____, 47 L. Ed. 2d 128, 136-137 [March 2, 1976]; Serano v. People of the State of California, 361 F. 2d 474 [9th Cir., 1966], cert. den. 385 U.S. 993). Accordingly, the District Court properly dismissed the complaint against the State of New York and Judge Niemer.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Dated: May 20, 1976

Respectfully submitted,

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Wardell Hunter,
Plaintiff-Appellant,

-against-

Raymond R. Niemer, et al.,
Defendants-Appellees.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith

, being duly sworn, says:

I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the defendants-appellees herein.

On the 26th day of May 1976 I served
the annexed brief for appellee state of New York upon the
person
~~xxxxxxx~~ named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said person
~~xxxxxxx~~ at the
address within the State respectively theretofore designated by
him for that purpose as follows:

Mr. Wardell Hunter
401 Northampton Street
Buffalo, New York 14208

Sworn to before me this

26th day of May 1976

Ralph J. Canale

RALPH J. CANALE
Notary Public, State of New York
No. 4418140
Qualified in Albany County
Commission Expires March 30, 1977

Beverly J. Smith